

In the United States Court of Federal Claims

Filed: June 26, 2018

IN RE DOWNSTREAM ADDICKS
AND BARKER (TEXAS) FLOOD-
CONTROL RESERVOIRS

Sub-Master Docket No. 17-9002L

THIS DOCUMENT APPLIES TO:

ALL DOWNSTREAM CASES

ORDER

On June 22, 2018, Plaintiffs filed a Status Report in the above-captioned case that notified the court of two unresolved discovery issues. The first issue concerns Electronically Stored Information (“ESI”). The June 22, 2018 Status Report states that the “Government’s electronic communications including attachments, according to [the] Government, can only be located through ESI searches utilizing relevant search terms.” ECF No. 99 at 2. The parties have spent several weeks negotiating ESI search terms “and a process . . . whereby [the] Government would run a test utilizing search terms, report on the results to determine if the terms needed to be modified to yield the desired results; and then, following the test run, the full search would be completed.” ECF No. 99 at 2. This lengthy negotiation process was necessitated, because the “Government has taken the position that it will only undertake one search[.]” ECF No. 99 at 2. To complicate this process, the Government now has taken the position that it “cannot provide any definite date as to when the ESI search will be completed and when the electronic communications and documents will be produced.” ECF No. 99 at 2.

The June 22, 2018 Status Report also states that the Plaintiffs served the Government with requests for documents, including:

Request No. 4: Please produce all documents and ESI in your possession, custody, or control relating to or reflecting communications regarding any induced surcharges, as that term is used in Water Control Manual 7-05(b), associated with the Reservoirs for the time period between August 25, 2017, and October 17, 2017.

Request No. 13: Communications, including but not limited to text messages and emails . . . , sent or received between August 25, 2017 and September 4, 2017 by any of the following individuals that concern Hurricane Harvey, Tropical Storm Harvey, the Addicks and Barker reservoirs and dams, flooding or related matters:

Richard Long, Colonel Lars Zetterstrom, Captain Charles Ciliske, Mario Bettingfield, Randall Cephuss, Gary Chow, Michael Kaufman, Charles Scheffler, Lori Thomas, Robert Thomas[,] and Jay Townson.

ECF No. 99 at 2–3. But, the “Government did not produce the requested documents and instead advised that production of the requested information cannot occur until the ESI searches are complete[.]” ECF No. 3.

The second unresolved discovery issue concerns the depositions of Government employees, pursuant to Rule of the United States Court of Federal Claims (“RCFC”) 30(b)(6). The June 22, 2018 Status Report states that “Plaintiffs scheduled the 30(b)(6) depositions of Robert Thomas for 7/12-7/13 and Jeffery East for 7/16, and the depositions of Richard Long for 7/18.” ECF No. 99 at 3. The Government, however, objected “to the 30(b)(6) topics identified by Plaintiffs[.]” ECF No. 99 at 3. After Plaintiffs narrowed some areas of inquiry, the “Government asserted that Plaintiffs must essentially accept and agree to all Government objections and limit the areas of inquiry before the depositions can move from being ‘tentative’ to being set.” ECF No. 99 at 3.

The court will convene a telephone status conference on Friday, June 29, 2018 at 1:00 p.m. (EDT) to address these discovery issues. Although the court will only recognize appointed Plaintiffs’ Co-Lead Counsel and counsel for the Government, members of the public may listen to the status conference. The court requests that all callers not participating in the status conference mute their phones. The status conference may be joined by dialing (888) 684-8852, entering Access Code 4779231#, and entering Code 1771#.

The court requests that Acting Assistant Attorney General Jeffrey Wood participate in the June 29, 2018 status conference to address why the “Government cannot provide any definite date as to when the ESI search will be completed and when the electronic communications and documents will be produced,” and on what authority the Government will undertake only one ESI search. The court set a later trial date in the above-captioned case to accommodate the Government. It appears to the court that the Government is not acting in good faith, but rather trying to prevent Plaintiffs from obtaining the discovery and facts they need to prove the elements of their case to establish jurisdiction and liability.

In addition, by 5:00 p.m. (EDT) today, June 26, 2018, Plaintiffs are directed to file a status report with the court that provides:

- (1) why “any induced surcharges, as that term is used in Water Control Manual 7-05(b), associated with the Reservoirs for the time period between August 25, 201, and October 17, 2017,” as described in Plaintiffs’ Request For Documents No. 4, is relevant;
- (2) the titles and dates of employment of the individuals named in Plaintiffs’ Request For Documents No. 13; and
- (3) copies of all requests for documents submitted by Plaintiffs to the Government that the Government has not answered.

The Government is also directed to file a status report with the court, by 5:00 p.m. (EDT) today, June 26, 2018, that provides copies of the Government's objections and proposed limitations to the areas of inquiry regarding the 30(b)(6) depositions.

If the Government is not willing to commence the proposed 30(b)(6) depositions by mid-July 2018, in good faith, the court is prepared to order the Government to produce these witnesses in Washington, D.C. at the United States Court of Federal Claims. The depositions will be conducted in one of the courtrooms and be open to the public. This will afford the court physical proximity, in the event a ruling on any objection becomes necessary.

IT IS SO ORDERED.

s/ Susan G. Braden

Susan G. Braden
Chief Judge